RECENT DECISIONS

COMMERCE—INTERSTATE COMMERCE—EMPLOYEES WITHIN FEDERAL EMPLOYERS' LIABILITY ACT.—An employee of a railroad was killed while engaged in the repair of an engine which had been placed in the roundhouse for the purpose of being overhauled. The engine was used before and after repair in both interstate and intrastate commerce. An action was brought by the deceased's administratrix under Federal Employers' Liability Act against the defendant, agent of the Director General of Railroads, to recover damages. The defendant contended that the deceased was not engaged in interstate commerce at the time of the injury. *Held*, defendant not liable. *Payne* v. *Wynne* (Tex.), 233 S. W. 609 (1921).

The test of employment in such commerce is whether the employee at the time of the injury was engaged in interstate transportation, or in work so closely related to it as to be a part of it. *Shanks* v. *Ry. Co.*, 239 U. S. 556, L. R. A. 1916C, 797 (1916).

It is well settled that one injured while working on permanent instrumentalities in connection with commerce, such as bridges, *Pedersen* v. *Ry. Co.*, 229 U. S. 146, Ann. Cas. 1914C, 153 (1913), pumping stations furnishing water for engines, *Roush* v. *Baltimore & O. Ry. Co.*, 243 Fed. 712 (1917), and signal towers, *Erie Ry. Co.* v. *Collins*, 253 U. S. 77 (1920), is entitled to recover under the Act, whether the railroad using such instrumentalities was engaged in interstate commerce or interstate and intrastate commerce combined.

Where injury was received from working on an engine temporarily up for repairs which was being used *solely* for interstate commerce, it was held to come within the Act. *Atlantic Coast Line Ry. Co.* v. *Woods*, 252 Fed. 428 (1918); *Baltimore & O. Ry. Co.* v. *Darr*, 204 Fed. 751 (1913).

The cases last cited are distinguishable from the instant case in that the engines in those cases were temporarily interrupted in an interstate haul and after being repaired continued in such commerce. Where the injury occurred while the plaintiff was repairing an engine, which had been used in interstate commerce before the injury and was so used afterwards, but when there was nothing to show that it was permanently assigned to such commerce at the time, it is not a case within the Act. *Minneapolis & St. Louis Ry. Co.* v. *Winters*, 242 U. S. 353, Ann. Cas. 1918B, 54 (1917). Its character as an instrument of commerce depends on its employment at the time and not upon remote probabilities or upon accidental later events. *Atlantic Coast Line Ry. Co.* v. *Woods, supra.*

A somewhat similar question has arisen in Virginia. Where an employee, at the instance of the injury, was firing a locomotive, which was shifting cars engaged in intrastate commerce for the purpose of making up an interstate train, he was held to be engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Southern Ry. Co.* v. *Jacobs*, 116 Va. 189, 81 S. E. 99 (1914). See also 1 VA. LAW REV. 73.